Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-802

LAURENCE ARTHUR JANELLE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The Petitioner, LAURENCE ARTHUR JANELLE, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered on June 1, 1979.

OPINION BELOW

On June 1, 1979, a three-judge panel of the United States Court of Appeals for the Ninth Circuit issued an Opinion affirming the District Court's Denial of Petitioner's Motion to Suppress Evidence (Appendix "A"). The Petitioner subsequently filed a Petition for Rehearing with a suggestion for rehearing en banc. Said Petition was denied.

JURISDICTION

On June 1, 1979, the Ninth Circuit Court of Appeals entered a Judgment affirming the Order of the District Court denying Petitioner's Motion to suppress Evidence. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of the Air Transportation Security Act of 1974 subjected air freight shipments to the government's administrative scheme to strengthen the security of

air transportation, and thus whether the searches in the instant case were subject to the Fourth Amendment of the United States Constitution.

2. Whether this case should be remanded to the District Court for a factual determination as to whether or not Western Airlines did, in fact, adopt and implement security procedures with respect to cargo, pursuant to 14 C.F.R. Section 121.538(c)(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated ....

STATUTORY PROVISIONS INVOLVED

a) 49 U.S.C. Section 1511

> a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier, to refuse to transport --
>
> (1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this

> title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or
>
> (2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance. Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

b) Section 121.538 Aircraft Security

> (a) .....
>
> (b) each certificate holder shall, before February 6, 1972, adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incediary device or weapon in carry-on baggage or on or about the persons of passengers, except as provided in Section 121.585. Each certificate holder shall immediately adopt and put into use its security program prescribed in paragraph (c) of this section.

(c) Each certificate holder shall prepare in writing and submit for approval by the Administrator its security program including the screening system prescribed in paragraph (b) of this section, and showing the procedures, facilities, or a combination thereof, that it uses or intends to use to support that program and that are designed to --

(1) Prevent or deter unauthorized access to its aircraft;

(2) Assure that baggage is checked in by a responsible agent or representative of the certificate holder;

(3) Prevent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures; and

(4) Assure that only persons authorized under Section 121.585 (a) are permitted to have on or about their persons or property a deadly or dangerous weapon accessible to them while aboard any of its aircraft.

c) Section 121.538 Aircraft Security.

* *

(k) Each certificate holder shall refuse to transport --

(1) Any person who does not consent to a search of his person

in accordance with the screening system prescribed by paragraph (b) of this section; and

(2) Any property of any person who does not consent to a search or inspection of that property in accordance with the screening system prescribed by paragraph (b) of this section.

d) Section 841 of Title 21, United States Code, provides in part as follows:

"... it shall be unlawful for any person knowingly or intentionally --

"to ... possess with intent to .... distribute, ... a controlled substance; ...."

Section 960 and 963 of Title 21, United States Code, provide in part as follows:

"Any person who attempts or conspires to commit any offense defined in this title ...." is guilty of an offense.

STATEMENT OF THE CASE

On October 26, 1977, Victor Moran was employed as a freight agent by Western Airlines, in Miami, Florida. On this date, an unknown male, identifying himself as Tim Spencer, presented Moran with a package which was to be

air shipped to San Diego, California. Spencer was visibly nervous, and when asked his name, appeared to think twice before responding. When asked about the contents of the package, Spencer claimed it contained photographs. The package was addressed to Laurence A. Janelle, 426 Fourth Avenue, Encinitas, California. (Clerk's Record, p. 35). [1/]

After the package was accepted by Moran, Spencer departed from the freight office. Moran then took the package to his supervisor, Terry Wood. Moran related the above information to Wood. (C.R. p. 36). Additionally, Moran told Wood that Spencer "fit the profile". (Reporter's Transcript, p. 6).[2/] This "profile" is estab-

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[1/] Clerk's Record is hereinafter referred to as "C.R.".

[2/] Reporter's Transcript is hereinafter referred to as "R.T.".

lished by Western Airlines pursuant to FAA regulations. (R.T. 10). Wood described the profile as "an unknown shipper that comes up to us and wants to ship something somewhere, and he pays cash for it, and we have never seen him before." (R.T. p. 6). This would be an individual as opposed to a commercial shipper. (R.T. p. 6).

Wood knew that a Frontier jet had been hijacked a week earlier. He also knew that a bomb threat had been made at the airport two (2) days earlier. (R.T. pp. 8, 12).

Because Wood was apprehensive that the package might contain an explosive device, he cautiously unwrapped it and discovered two clear, plastic bags containing a white powder. Wood then called the Dade County Public Safety Department. (C.R. p. 36).

The powder was found to be cocaine. The package was resealed and shipped to San Diego,

where appellant Laurence Janelle was arrested after picking up the package. (C.R. p. 37).

There was neither an arrest warrant nor a search warrant for the package in which the contraband was found. (R.T. 3).

REASONS FOR GRANTING THE WRIT

The resolution of the question of whether the Air Transportation Security Act of 1974, and subsequent legislation, subjected air freight shipments to the government's administrative scheme to strengthen the security of air transportation is one of critical constitutional importance inasmuch as it requires a definitive ruling as to the scope of the protection afforded by the Fourth Amendment of the United States Constitution to airports.

THE STATE OF THE LAW REGARDING THE FOURTH AMENDMENT AND AIRPORTS IS FRAGMENTED AND INCONSISTENT

The case of United States v. Davis, 482

F.2d 893 (9th Cir. 1973) decided that searches of airline passengers and their carry-on baggage were conducted by the airlines pursuant to federal legislation, and as a part of the general regulatory scheme to strengthen the security of air transportation. The congressional intent behind the amendments and regulations which have been passed and implemented under and subsequent to the Air transportation Security Act, and specifically 14 C.F.R. Section 121.538(c) raise valid issues as to whether or not actions of an airline taken pursuant to those regulations would create a sufficient nexus of government involvement to bring a search of air freight items within the purview of United States v. Davis, supra, and thus within the Fourth Amendment. It is submitted that the Opinion in United States v. Gumerlock and Fannon, 590 F.2d 794 (9th Cir. 1979) and the Opinion in the instant case is in conflict with the Ninth

Circuit Opinion in United States v. Davis, supra.

THIS COURT HAS NEVER DECIDED AN AIRPORT SEARCH QUESTION

United States v. Davis, supra, holds searches of passenger and carry-on luggage are subject to the strictures of the Fourth Amendment. This conclusion is based upon the extensive federal involvement in air transportation security. This decision has been followed by several other circuits.

The Opinion in Gumerlock and Fannon, supra, and in the instant case carves an exception to the Davis rule for air freight that is unwarranted by the legislative history and logic. This Opinion, by failing to follow Davis, effectively places the Ninth Circuit at odds with several other circuits.

THIS CASE SHOULD BE REMANDED FOR A FACTUAL DETERMINATION AS TO WHETHER WESTERN AIRLINES DID ADOPT AND IMPLEMENT SECURITY MEASURES PURSUANT TO 14 C.F.R. SECTION 121.538(c)(3)

In United States v. Gumerlock and Fannon,

supra, the Court of Appeals en banc concluded that Congress did not intend to require that air freight shipments be subjected to the security screening process mandated by government for passengers and their carry-on possessions. In particular the two packages involved in Gumerlock were not examined as part of a government mandated security program. 590 F.2d 794 at 796.

This conclusion was based primarily on the fact that there was nothing in the record to indicate whether United Airlines in fact adopted any security procedures with respect to cargo, or, if it did, whether the procedures include inspections approved by the administrator. United States v. Gumerlock and Fannon, supra, at 799.

By contrast, the record made in the District Court in the instant case demonstrates that the reason the package submitted by the sender was subjected to search by Western Airlines personnel

at Miami International Airport was that the sender fit the profile of a suspicious individual which was established by Western Airlines in accordance with the FAA regulations governing the shipment of goods by common carrier.

It is true that the record does not show whether or not inspections were approved by the Administrator. However, at the time of the motion to suppress evidence in the District Court, United States v. Fannon, 556 F.2d 961 (9th Cir. 1977), was the law of the Circuit and the inquiry of the District Court focused not on whether the search constituted governmental action, but whether the search was reasonable.

Therefore, it is Petitioner's contention that:

1. The requisite showing of governmental involvement in the search has been made.

2. Even if the Court concludes that it

is Petitioner's burden to show approval by the administrator of the FAA, the case should be remanded to the District Court to allow Petitioner to make such a showing.

At the time of the motion to suppress evidence, counsel had no reason to anticipate what the law of the Circuit would become in the future. Trial counsel must necessarily be directed by the law of the Circuit as it exists, and must be directed by the Inquiries of the Court.

It is submitted that in the instant case the record was developed as far as reasonably possible.

Rejection of this appeal based on failure to adequately develop the record, under these circumstances, constitutes a denial of the basic concepts of fairness and procedural due process. Fortunately, this situation can be remedied by a remand to the District Court for a rehearing.

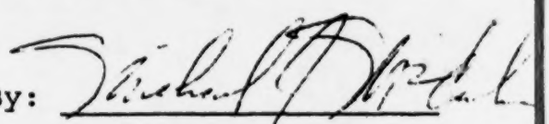
CONCLUSION

For the foregoing reasons, the Petitioner, Laurence Arthur Janelle, respectfully requests a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Dated: November 14, 1979

Respectfully submitted,

SAVITZ & McCABE

By: 

Michael J. McCabe
Attorneys for
Petitioner
LAURENCE ARTHUR JANELLE

PROOF OF SERVICE

I, Michael J. McCabe, hereby declare:

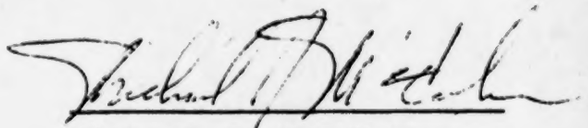
That I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within action.

That my business address is 108 Ivy Street, San Diego, California.

That on November , 1979, I placed an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under penalty of perjury that the foregoing is true and correct. Executed on this day of November, 1979, at San Diego, California.



Michael J. McCabe

Filed: June 1, 1979

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- LAURENCE ARTHUR JANELLE, Defendant-Appellant.	)	No. 78-1837 MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judges

Janelle appeals from his conviction for conspiracy to possess and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §846 and 841(a)(1).

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* The Honorable Walter E. Hoffman, United States District Judge, Eastern District of Virginia, sitting by designation.

APPENDIX "A"

The only issue he raises pertains to whether or not an inspection of a consigned package by air freight employee constitutes government action so as to bring the search within the purview of the Fourth Amendment.

We deferred decision of this case until our court decided en banc United States v. Gumerlock and Fannon, 590 F.2d 794 (9th Cir. 1979). With the guidance of that case, we now conclude that government action was not involved and, therefore, we do not need to determine whether the warrantless search was reasonable.

Janelle contends that pursuant to 14 C.F.R. Section 121.538(c) (1976), the FAA required the carrier to promulgate a security program and a part of the resulting program was a description, known as a "profile", of a suspicious individual. Janelle contends that "since the record in the instant case clearly demonstrates that the sender of the

package in question was suspected because he 'fit the profile' of a suspicious individual promulgated as a result of the regulation," the required governmental involvement is demonstrated.

As we read United States v. Gumerlock and Fannon, we do not agree. There we stated "This provision does not require carriers to adopt any particular security procedures with respect to cargo; specifically, it does not require inspection of cargo. There is nothing in the record to indicate whether United Airlines in fact adopted any security procedures with respect to cargo, or, if it did, whether the procedures include inspections approved by the administrator." Id. at 799 (footnotes omitted). Here we have essentially the same situation. The regulation does not require inspection of cargo. There is nothing in the record to indicate that any inspection procedures were approved

by the administrator. That Western Airlines adopted a security program pursuant to a regulation is a far cry from the administrator approving inspections.

AFFIRMED.